IN THE

Supreme Court of the United States.

THE CITY OF NEW YORK and BIRD S. COLER, as Comptroller thereof,
Petitioners,

AGAINST

SAMUEL PINE and FREDERICK MULLER,
Respondents.

Brief for Respondents in opposition to Petition for Writ of Certiorari.

Statement.

This is an application by the petitioners for a writ of *certiorari* to review a decree of the United States Circuit Court of Appeals for the Second Circuit, affirming the decree rendered by the United States Circuit Court for the Southern District of New York in the suit of Samuel Pine and Frederick Muller, complainants, against the Mayor, Aldermen and Commonalty of the City of New York, defendants, perpetually enjoining the City of New York from diverting the waters of the west branch of Byram River or a part thereof from its natural channel into its reservoirs. The petition shows that the City of New York is a municipal corporation of the State of New York, and is the corporate successor of the said defendant.

The respondents are owners of land lying within the State of Connecticut and are citizens of the State of Connecticut. The west branch of the Byram River rises in the State of New York and traversing that State for a few miles crosses the boundary line between it and the State of Connecticut and after traversing that State empties into Long Island Sound. It is a non-navigable river. After crossing the boundary line it unites with the east branch and forms the Byram River. The Byram River then runs along and intersects the lands of the respondents. The City of New York constructed a dam on the west branch of the said Byram River, in the State of New York, a few hundred feet from the said boundary line, which dam it uses to divert the water of the said river from the water shed of the Byram River, carrying it many miles away to the City of New York, where it is used for municipal purposes. and thereby is wholly lost to the river and the lands of the respondents.

It would seem that no question exists between the parties to the action as to the facts. They are substantially admitted by the answer of the defendant (see Record, fol. 16). The testimony of the City's chief engineer, introduced on behalf of the respondents, is to the effect that the diversion is one-third of the flow of the stream through or over the lands of the respondents (fols. 23, 175, etc.). The City conceded that the respondents were damaged, denying only that they were damaged in the sum of twenty-four hundred dollars and more (see Answer, Record, fol. 23), and the city pleaded its ability and willingness to pay damages (fol. 24).

The case came on for trial in the United States Circuit Court for the Southern District of New York. Decision was rendered in favor of the respondents, and on July 28, 1900, a decree granting them their permanent injunction was filed (See Record, fol. 832). The opinion of the learned Justice of the Circuit Court will be found at folio 814

of the record. The City appealed to the United States Circuit Court of Appeals for the Second Circuit. The case was argued in that Court in March, 1901, and on the 30th day of October, 1901, the Court handed down its decision, affirming the decision of the Court below, Mr. Justice Wallace and Mr. Justice Thomas concurring. Mr. Justice Wheeler dissented. The opinion of the Court and the dissenting opinion of Mr. Justice Wheeler will be found in the record, pages 221 and 233.

POINTS.

I.

The writ of certiorari should not be granted. The City voluntarily relinquished its right of appeal to this Court, and cannot now secure a hearing by writ of certiorari.

The City by its answer and by its acceptance of the issues raised by the bill of the respondents voluntarily united in framing this as a case non-appealable to this Court. The City having thus voluntarily surrendered all right of appeal to this Court at the commencement of the action and having been defeated cannot now have a writ of *certiorari* thereby indirectly securing an appeal the right to which it long ago relinquished.

The bill of the respondents alleges the different citizenship of the parties. This is the only direct allegation of jurisdiction in the bill and by it and through it the United States Circuit Court acquired jurisdiction (Record, fol. 2). Mr. Justice

Wheeler in his dissenting opinion points out this fact (Record, p. 233). He says: "The plaintiffs " have come into this Court because they were citi- " zens of another State and not because the land " through which they derive their rights to the " water taken is situated in another State."

Where the jurisdiction of the United States Circuit Court attaches only because of allegations of diverse citizenship there is no appeal to this Court.

Act March 3, 1891, C. 517, 26 Stat., (U. S.), 826.

Even though constitutional questions may inhere in the case or may develop in its progress, no right of appeal to this Court exists or can arise if it appear from the pleadings that jurisdiction is sought on the ground of citizenship alone.

Borgmeyer, Admr., *v.* Idler, 159 U. S., 408.

Col. Cent. Mining Co. *v.* Turck, 150 U. S., 138.

The respondents might have *pleaded* constitutional grounds; they might have raised by direct allegation the question of the taking of private property without the process of law; and likewise the City, instead of accepting the grounds of jurisdiction pleaded by the respondents, and thereby cutting off the right of appeal to this Court might and should have raised in its answer by direct allegation the constitutional question if it conceived of its case as resting on constitutional grounds. It could have pleaded the Statute of the State of New York, under which it assumes to act, and thereby could have expressly framed, in its answer, a constitutional question drawing to the case the appellate jurisdiction of this Court.

BUT THE ANSWER OF THE CITY IS SILENT IN RESPECT TO EVERY SUCH QUESTION. THE STATUTE OF NEW YORK IS NOT PLEADED. FOR ALL THAT AP-

PEARS, THE ACT OF THE CITY OF NEW YORK IN CONSTRUCTING ITS DAM IS IN VIRTUE OF NO SPECIAL RIGHT AND UNDER NO SPECIAL POWER OR AUTHORITY.

Therefore, the City, in its acceptance of the issues framed by the bill and by the form and very substance of its own pleading, waived every ground upon which it could invoke as of right the appellate jurisdiction of this Court.

What the respondents have alleged in their bill and what the City has conceded in its answer, the admissions and waivers of the respective pleadings are a contract between the parties. The rights which they have created in each other by their admissions and waivers are vested rights, and this Court will not divest either party of such rights.

Knox *v.* Morer, 72 Iowa, 154.
McEachern *v.* Kirchner, 90 N. C., 177.
Stump *v.* Long, 84 N. C., 616.

To grant the writ of *certiorari* in this case would be nothing more than to revest in the City a right which it surrendered to the respondents and which the respondents tacitly accepted when the parties first appeared in court. This Court will not strip the respondents of a right which the City has by its own act vested in them. It has been the constant effort of Congress and the Federal courts by statute, rule and decision to confine the hearing of appeals by this Court to certain special cases. Congress has gone far in express enactment and the courts have formulated rules of the strictest character to prevent a defeated litigant from obtaining by grace through a writ of *certiorari* what was denied him of right.

Act March 3, 1891, C. 517, 26 Stat. (U. S)., 826.
Forsyth *v.* Hammond, 166 U. S., 506.
Col. C. C. M. Co. *v.* Turck, *supra.*
Borgmeyer *v.* Idler, *supra.*

In the light of these authorities can this Court grant the writ in a case where, had the City *pleaded* the facts it now alleges and which were as well known when it pleaded as they are now, it could have established its *right* of appeal to this Court?

Counsel for the respondents submit that for this Court to grant the petition in this case will establish a precedent whereby a writ of *certiorari* will become the moral right of every defeated litigant who, by his pleading or his practice, has lost his "*right* of appeal." Thereby, the benefits of the statute of 1891 will be largely lost and the plain purpose of Congress set at nought.

II.

The writ of certiorari should not be granted because the grounds recognized by this Court as necessary to sustain the granting of the writ do not exist.

This Court has said in Forsyth *vs.* Hammond, 166 U. S., 506, that its power of *certiorari* "will be "sparingly exercised, and only when the circum-"stances of the case satify us that the importance "of the question involved, the necessity of avoiding "conflict between two or more courts of appeal, "or between courts of appeal and the courts of a "State, or some matter affecting the interests of "this nation in its internal or external relations, "demand such exercise."

In the case at bar there is no conflict between two or more courts of appeal or between United States courts of appeal and the courts of a State. The simple question presented in this case is whether a person or corporation by an act done in one State

can lawfully divert an interstate unnavigable water course from the freeholds of citizens in the adjoining State. The question is one of property law. No claim is made by the City that the law of the State of New York and the law of the State of Connecticut, or the decisions of the courts of those two States, differ in respect to the right of a riparian owner to have a stream flow as by nature it was wont to flow. The decisions of the two States uniformly hold that the right of a riparian owner is not a mere easement, but is property *per se*, and that when it is taken by an act or diversion the remedy is by injunction in equity.

Gardner *vs.* Village of Newburgh, 2d Johnson's Chancery, 162.

Corning *vs.* Troy Iron and Nail Factory, 40 N. Y., 204.

Gilzinger *vs.* Saugerties Water Company, 66 Hun, 173; affd., 142 N. Y., 633.

Amsterdam Knitting Company *vs.* Dean, 162 N. Y., 278.

Stroebel *vs.* Kerr Salt Co., 164 N. Y., 303.

Garvey *vs.* Long Island R. R. Co., 159 N. Y., 332.

Lake *vs.* Horn, 45 Conn., 409.

Mason *vs.* Hoyle, 56 Conn., 255.

Harding *vs.* Stamford Water Co., 41 Conn., 87.

Enfield *vs.* Connecticut River Co., 7th Conn., 28, p. 50.

Parker *vs.* Griswold, 17 Conn., 207.

Water Commissioners *vs.* Perry, 69 Conn., 468.

Gould on Water Courses, 2d Ed., Sec. 204, Sec. 366.

Black's Pomeroy on Water Rights, Sec. 9.

Angell on Water Courses, 7th Ed., Sec. 8, Sec. 389, Sec. 394.

As there is no conflict between two State courts of appeal, so there is no conflict between the United States Courts and the Courts of a State or between United States Courts in the different Circuits. The Circuit Court of the United States for the Circuit embracing Connecticut and New York has adopted and applied the same principles of law as are expressed in the New York and Connecticut cases cited above (see Holyoke Water Power Company *vs.* Connecticut River Company, 22 Blatch., 131).

More than all this, the history of the law generally, touching the point at issue presents an unbroken line of authorities in support of the views expressed above in favor of the respondents. They are stated below:

1845. United States *vs.* Ames, 1 Wood & Min., page 76, Opinion by Mr. Justice Woodbury.

1855. Opinion of Honorable Thomas E. Franklin, Attorney-General of Pennsylvania, rendered upon the request of Gov. Pollock, 54 Am. Law Register, page 385.

1881. Rutz *vs.* The City of St. Louis, 7 Fed. Rep., page 438. Opinion of Mr. Justice Treat.

1884. Holyoke Water Power Co. *vs.* Connecticut River Co., 52 Conn., 570. Opinion of Mr. Justice Nathaniel Shipman (U. S. Circuit Court).

1894. Opinion of Messrs. George B. French and Jeremiah Smith* of the New Hampshire Bar, rendered upon the proposed appropriation by the City of Boston of the waters of the Nashua River, an interstate river as regards Massachusetts and New Hampshire (see Harvard Law Review, Vol. 8, p. 138).

In harmony with this array of authorities covering a century of our jurisprudence, the learned trial Justice in the case at bar rendered his decision in favor of the complainants. That decision the Appellate Court has affirmed. The dissenting opinion of Mr. Justice Wheeler cites only two authorities.

* Mr. Smith is an ex-justice of the Supreme Court of New Hampshire, and one of the faculty of the Harvard Law School.

The decision of this Court in Head *vs.* Amoskeag Company, 113 U. S., page 9, and Brickett *vs.* Haverhill Aqueduct Co., 142 Mass., page 394. The first case named, however, was not the case of an interstate river, and can have no application to the case at bar. The case of Brickett *vs.* Haverhill Aqueduct Co. is considered, and its lack of application to the case at bar thoroughly exhibited in the opinion of the Court of Appeals.

III.

The petition should be denied.

MARSHALL, MORAN & WILLIAMS,
Solicitors for Respondents.

CHARLES C. MARSHALL,
STEPHEN G. WILLIAMS,
Of Counsel.

December, 1901.

ADDENDUM: Counsel for respondents pray leave to suggest to the Court that they are informed that the case of The State of Kansas *vs.* The State of Colorado is set down for argument in this Court February twenty-fourth, 1902. That case arises on a bill in equity by a State for an injunction against a State to prevent the diversion of an interstate stream alleged to be navigable. It is said to present questions arising under legislation, both State and Federal, in derogation of the common law of riparian property. The case in which this petition is presented, as already shown, arises on a bill in equity by private citizens of one State against a corporation of another State for the diversion of an inter-

state stream admitted to be non-navigable. The property questions it presents are limited to the common law of riparian property. We beg to submit that the narrower scope of the latter case in respect to parties, as well as in respect to issues, make desirable its hearing and decision prior to or coincident with the case of Kansas *v.* Colorado.

It is, therefore, respectfully suggested that this Court, if it grant the writ of *certiorari* in this case, should advance this case to hearing prior to or at the same time with the case of Kansas *v.* Colorado.

Our understanding is that counsel for the petitioners acquiesce in the suggestion that this case be so advanced.

CHARLES C. MARSHALL,
STEPHEN G. WILLIAMS,
Of Counsel.